CHENDERING DEVELOPMENT SDN BHD

v.

BANK BUMIPUTRA MALAYSIA BHD

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL KADIR SULAIMAN J
[CIVIL SUIT NO: 22-18-90]
19 SEPTEMBER 1999

CIVIL PROCEDURE: *Discovery - Time to make application - Consolidation of actions instituted at different times - Earlier action past stage of usual interlocutory processes while in later action only defence had been filed - Effect of consolidation is that action instituted later carried on in action instituted earlier - Trial date for consolidated actions fixed - Whether party to later action may now apply for discovery - Whether application for discovery may only be made upon close of pleadings - Whether party to later action ought not to be deprived of making application because trial date fixed - Rules of the High Court 1980, O. 24 rr. 1, 2, 3 & 7*

CIVIL PROCEDURE: *Discovery - Application for - Whether applicant must state under which rule he applies - Whether failure to so state justifies refusal of application - Whether sufficient if intent of application is clear*

The plaintiff ('Chendering') commenced an action against the defendant ('the bank') in the Kuala Lumpur High Court while the bank had previously taken out a writ against Chendering in the Kuala Terengganu High Court. On the bank's request, the court granted an order that the Kuala Lumpur suit be transferred to Kuala Terengganu and consolidated with the Kuala Terengganu suit. Prior to the consolidation order, the Kuala Terengganu suit had undergone the summons for direction process, while in the Kuala Lumpur suit, the statement of defence had just been filed. The consolidated suits were then set down for trial. However, the hearing was adjourned pending this application by Chendering for the discovery of a specific document needed for the trial of the two consolidated suits. The bank raised the following two preliminary objections: (i) there was a delay on the part of Chendering in making the application as the trial date had been fixed; and (ii) the applicant did not specifically state under which provision of the Rules of the High Court 1980 ('the RHC') was this application made.

Held:

[1] An application sought by an applicant must be clear as to its intent. Particularly so when an application involves prayers involving more than one provision of the RHC and each provision provides for different procedures to achieve the purpose of the application. The present application, however, is not of such a nature. The application made by Chendering for the production of the document for the purpose of the trial was clear and plain. It asks for specific discovery of a certain document relevant to it in pursuing its claim against the bank. There are no two or more sets of procedures laid down by the RHC for such a discovery of a specific document.

[2] Generally, under O. 24 r. 1 of the RHC, discovery is made after the close of pleadings. However, O. 24 r. 7 thereof allows an application for discovery to be made at any time even after the normal period for discovery of documents as provided by O. 24 rr. 2 and 3 of the RHC.

[3] By the operation of O. 4 r. 1(2) of the RHC, the order for consolidation resulted in the original Kuala Lumpur suit being carried on in the existing Kuala Terengganu suit. It is not expected of Chendering to have an independent interlocutory process in respect of the Kuala Lumpur suit in preparation of the trial since that suit had merged with the existing Kuala Terengganu suit which had already undergone the usual interlocutory process of its own before the order for consolidation was made. Thus it is fair for Chendering to have made this application at this late stage in order to properly present its case before the court in the joint trial of the two consolidated suits. Therefore, due to the unique circumstances of the case, Chendering ought not be deprived of having a chance to make this application simply because the trial date has been fixed.

[Preliminary objection dismissed.]

Case(s) referred to:

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(dist)***

Mohd Azam Shuja & Ors v. United Malayan Banking Corporations Bhd [1995] 1 CLJ 861 ***(dist)***

Wagon Engineering Sdn Bhd v. Sulaiman Buloh Semenanjung Enterprise Sdn Bhd [1988] 2 CLJ 861 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 4 r. 1(2), O. 14, O. 18 r. 19, O. 24 rr. 1, 2, 3, 7, O. 25, O. 28, O. 34, O. 89

Subordinate Courts Rules 1980, O. 14 r. 21, 26A

For the plaintiff - Thangaraj Balasundram; M/s Thangaraj & Assoc
For the defendant - Peter Pereira; M/s Skrine & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Kadir Sulaiman J:

This is an application by the plaintiff (Chendering Development) for an order directing the defendant (the bank) to produce to the court the following documents:

i) the project paper in respect of the development project on land known as Title No. 1489 and 1890, Lot No. 2199 and 2200, Mukim Kijal, Daerah Kemaman, Terengganu which was presented to the Defendant Bank by the Plaintiff at the time of the application for a loan of RM5 million which was approved by the Defendant Bank as per Letter of Offer of 11th March 1982,

ii) all correspondence between the Plaintiff and the Defendant in relation to the said RM5 million loan approved by the Defendant as per the said Letter of Offer of 11th March 1982,

iii) and any other orders or relief the court deems fit and suitable.

At the hearing of the application, the above second prayer was abandoned leaving only prayers (i) and (iii) to be pursued. The reasons given for the application are that the said project paper submitted by Chendering Development to the bank in support of its application for an overdraft facility of RM5 million is necessary for the trial scheduled for 10 to 12 July 1999 in support of Chendering Development's claim against the bank in Civil Suit No. 22-18-90 for breach of the loan agreement. Chendering Development's copy of the same was lost from its possession. A letter of 28 April 1999 asking for the said documents received no response from the bank.

In reply to this application of Chendering Development, the bank filed an affidavit affirmed by Norhayati Hashim on 9 July 1999 in encl. (78) deposing that without prejudice to its right to raise an objection to the said application of Chendering Development, the application did not provide the details concerning the project paper sought. It is further deposed that after receiving the request by the applicant of 28 April 1999, the bank had taken step to trace the so called project paper but was not able to trace it.

As expected, at the hearing of the application on 15 August 1999, the learned counsel for the bank, Encik Pereira, objected on a preliminary issue. He cited as authorities *Mohd. Azam Shuja & Ors. v. United Malayan Banking Corporations Bhd.* [1995] 1 CLJ 861; [1995] 2 MLJ 851 and *Wagon Engineering Sdn. Bhd. v. Sulaiman Buloh Semenanjung Enterprise Sdn. Bhd.* [1988] 2 CLJ 861 as requiring that an applicant is required to specifically state under which provisions of the rules or the law its application is based. For Chendering Development's failure in this present application to so state the provisions under which it was made, the application must be dismissed. In *Mohd. Azam Shuja,* the respondent sued the appellants for loss suffered and damage by reason of the negligence of the appellants. The respondent's interlocutory application before the sessions court prayed for an order that the statement of defence be struck out under O. 14 r. 21 of the Subordinate Courts Rules 1980 ('the SCR") and under the inherent jurisdiction of the court on the grounds that it disclosed no reasonable defence, was frivolous and vexatious and an abuse of the process of the court. The application also contained an alternative prayer for an order that the respondent be at liberty to enter summary judgment under O. 26A of the SCR. The Sessions Court allowed the application for summary judgment. The appellants appealed to the High Court which dismissed the appeal. The appellants further appealed to the Court of Appeal. At the commencement of the hearing of the appeal in the Court of Appeal, the court inquired whether it was proper for the respondent to pray for an order to strike out the statement of defence and alternatively for summary judgment in the same application. The Court of Appeal held that where there are two such prayers in one application, the court ought to proceed with the application for summary judgment and not with the striking out application. Zakaria Yatim JCA (as he then was) said at p. 858:

> Ms Sujata referred to the following passage in the judgment of Siti Norma Yaakob J, as she then was, in *Wagon Engineering*:
>
> > At the outset, I need to point out that it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that are really in dispute. The plaintiff should elect whether it wished to proceed under O. 18 r. 19 or O. 14, but it cannot proceed with both.
>
> It is to be noted that the passage quoted above was followed by Haidar J in *Asia Life Assurance*. At p. 2055, the learned judge said:
>
> > No doubt it is a matter in the appellant's discretion to proceed either under O. 14 r. 12 or O. 26A of [the] SCR but I do not think the appellant could proceed on both.

> I entirely agree with Siti Norma Yaakob J and Haidar J that a plaintiff cannot proceed with both prayers for striking out and for summary judgment in one application. The reasons are obvious. Firstly, under O. 26A of the SCR the primary emphasis is on the affidavit. No defence need be filed. In an application under O. 14 r. 21 of the SCR, there must be a statement of defence. Secondly, in an application under O. 26A, the court has to decide whether there are triable issues which ought to be tried.
>
> In the present case, since there were two such prayers in one application, the Sessions Court ought to have proceeded with the application for summary judgment and not with the striking out application. See *Bakti Saujana*. In the High Court, the learned judge treated the matter as an application for summary judgment.

Having considered the authorities so cited, I cannot agree with the contention put forward by Encik Pereira for the bank to the extent that this application of Chendering Development ought to be dismissed simply for its failure to state the provisions under which it was made. All that the principle laid down by the authorities is that the application sought by an applicant must be clear as to its intent. Particularly so when an application involves various prayers involving more than one provisions of the rules and each provisions provides for different procedures to achieve the purpose in the application. Even in *Wagon Engineering*, the application that was before the Senior Assistant Registrar is worded in such a way that it may well be construed to be an O. 18 r. 19 application to have the statement of defence struck off or alternatively an O. 14 application for summary judgment for the sums claimed in the statement of claim or both. See the second paragraph of the judgment of Siti Norma Yaacob J at p. 861. It would appear from the said judgment that in its application before the Senior Assistant Registrar the applicant there did not state at all the provisions under which it acted. Thus from the nature of the application, it could be one under O. 18 r. 19 or under O. 14 of the Rules of the High Court 1980 ("the RHC"). But the Senior Assistant Registrar treated the application as one under O. 14. Siti Norma Yaacob J at para. 4 of the judgment said:

> In this suit the application was filed 9 months after the Statement of Defence was filed and 3 months after the Summons for Directions were given and under such circumstances, I considered that the most appropriate application should have been under O. 18 r. 19 but since resort to O. 14 is also pleaded in the alternative and considering that the hearing before me was in the nature of a rehearing, I had likewise proceeded to deal with the application in the alternative and heard submissions on both O. 18 r. 19 and O. 14.

Finally at p. 862 her Lordship concluded:

> Since there are disputed facts disclosed in the affidavits and issues raised at the hearing, I decided that this was not a proper case for which either O. 14 or O. 18 r. 19 can apply. To that end, I had set aside the Senior Assistant Registrar's order and allowed the appeal with costs.

This decision of the High Court was entirely agreed upon by the Court of Appeal in *Mohd. Azam Shuja*. From the authorities above, it is established that no applicant should lump up everything in one application because each matter may require different evidence necessary to establish the matter sought. If such application was made, at the hearing the applicant is required to make an election as to which particular provisions of the Rules it wishes to proceed. It is not the authority, therefore, that an application must be dismissed if the applicant does not state in its application the specific provisions under the rules of the court. It suffices if the intent of the application is clear. Of course, it will be of great help to all concerned if specific provisions is cited in the application.

Then Encik Pereira referred to *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari b Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 AMR 759, another decision of the Court of Appeal in support of his request for the court to dismiss this application of Chendering Development. In that case, the landlord took out an originating summons claiming vacant possession from the tenant. The summons was intituled generally in the RHC without specifying the order under which the court was being moved. The landlord's application for vacant possession in that case could have been taken under either O. 89 or O. 28 of the RHC depending on the circumstances of the case. Each of these orders provides for different procedure applicable to an applicant in order to move the court to invoke its jurisdiction or power to get rid of the occupant of the land. The procedure under O. 89 is a special summary procedure whilst the procedure under O. 28 is an ordinary and general originating summons procedure. However, the landlord in his application failed to state specifically under which of the provisions of the RHC he was making his application. In that context, Gopal Sri Ram, JCA said the following at p. 793:

> The summons does not ... state any particular Rule of Court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, one might ask, is a defendant or the court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it. If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that

> requires an intitulement then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation.

When his Lordship said of an originating summons or other originating process that requires an intitulement, I understand his Lordship was referring to the differences in procedure and practice relating to an application such as that presented by the landlord to be either under O. 89 or O. 28 of the RHC. Failure to specifically state so in such an application is fatal to the applicant. There again, the requirement for specific provisions of the rules is necessary because of the involvement of different procedures in disposing off of the matter before the court. However, this present application of Chendering Development is not of such a nature. The application it made for the production of the document for the purpose of the trial of the action is clear and plain. It asks for specific discovery of a certain document relevant to it in pursuing with its claim against the bank in the main suit which trial was scheduled to commence on 10 July 1999. There is no two or more sets of procedures laid down by the RHC for such a discovery of a specific document.

For the bank, it is further said that this application for discovery by Chendering Development is made at such a late stage when the action is already set for trial. While generally under O. 24 r. 1 of the RHC discovery is made after the close of the pleadings, however, O. 24 r. 7 thereof allows for discovery of specific documents which application can be made at any time even after the normal period for discovery of documents as provided for by O. 24 rr. 2 or 3 of the RHC. To my mind this is such a nature of application made by Chendering Development by its present application. More so in this case, the main action to which this application relates was originally commenced in the Kuala Lumpur High Court on 25 April 1988 by Chendering Development as the plaintiff. But long before that in respect of the same matter, the bank on 21 July 1986 took out a writ against Chendering Development and three others as defendants in the Kuala Terengganu High Court in Civil Suit No: 23-58-1986. The Kuala Lumpur suit which this present application is concerned, was by an order of court of 23 October 1989 transferred to Kuala Trengganu and thereafter be consolidated with the existing Kuala Terengganu suit mentioned earlier, upon the application of the bank made on 30 August 1988. At the time that application for transfer and consolidation made, the defendants in the suit had just filed their statement of defence on 16 July 1988. Pursuant to the said order, the suit was then registered as Kuala Terengganu Civil Suit No: 22-18-1990 in late February 1990. By then the existing Kuala Terengganu Civil Suit No: 23-58-1986 has gone through the process of summons for directions under O. 25 on 30 October 1988. So, there was no usual interlocutory process taken in respect of the original Kuala Lumpur suit, it

being consolidated and merged with the existing Kuala Terengganu suit. Then on 15 July 1990, the bank as the plaintiff in the existing Kuala Terengganu suit filed a notice setting down the action for trial pursuant to O. 34 of the RHC. However, the two consolidated suits never came up for hearing until scheduled for 10 July 1998 when it had to be adjourned pending the hearing of this present application of Chendering Development for the discovery of the specific document needed for the trial of the two consolidated suits. Such being the position, I don't think that Chendering Development ought to be deprived of having a chance to make this application simply because the trial date has been fixed. This case is unique in itself in the sense that by the operation of O. 4 r. 1(2) of the RHC the order for consolidation results in the original Kuala Lumpur suit thence forward be carried on in the existing Kuala Terengganu suit. In short the two suits are to be tried at the same time. If that be so, it is fair for Chendering Development to have made this nature of application at this late stage in order to properly present its case before the court in the joint trial of the two consolidated suits. Hence, the argument of delay put forward on behalf of the bank cannot be accepted under the present circumstances. After the consolidation exercise, it is not expected of Chendering Development to have an independent interlocutory process in respect of the suit in preparation of the trial for the suit had merged into the existing Kuala Terengganu suit which had undergone the usual interlocutory process of its own before the order for consolidation made. Hence, the preliminary objection by the bank is overruled. Hearing of the merits of Chendering Development's application to proceed.